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No. 87-1360

UNITED STATES SUPREME COURT

October Term, 1987

NORTHERN VIRGINIA LAW SCHOOL, INC., and
ALFRED AVINS,

Petitioners,

v.

SOUTHERN NEW ENGLAND SCHOOL OF LAW, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION

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QUESTIONS PRESENTED

1. Whether any Court of Appeals has jurisdiction to review a transfer order of a District Court which transfers a case to a district in another Circuit, and if so, which Court of Appeals?

2. Whether a state "long-arm" statute can constitutionally provide a basis for personal jurisdiction of a debtor who has agreed to pay a debt within that state by contracting to deposit the money in a bank designated by the creditor?

3. Whether a district court in one state may hear a claim for sanctions under 28 U.S.C. sec. 1927 for alleged misconduct of an attorney occurring in a district court in another state?

4. Whether Local Rules of one District may require a litigant whose case has been involuntarily transferred from another District to employ local counsel in addition to existing counsel?

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REPORTS DELIVERED BELOW

The memorandum and orders of the United States Court of Appeals for the First Circuit and United States District Courts for Massachusetts and Virginia are annexed in the appendix.

JURISDICTION

The order of the Court of Appeals was entered on December 31, 1987. This Court has jurisdiction pursuant to 28 U.S.C.§ 1254.

STATUTES AND RULES INVOLVED

28 U.S.C. sec. 1404(a):
"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

28 U.S.C. sec. 1294: ....
" appeals from reviewable decisions of the district courts shall be taken to the courts of appeals ... (1) ... for the circuit embracing the district;"

Virginia Code, sec. 8.01-328.1:
"A court may exercise personal jurisdiction over a person,... as to a cause of action arising from the person's (2) Contracting to supply services or things in this State;"

28 U.S.C. sec. 1927:

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

Local Rule 6 (b), United States District Court for the District of Massachusetts: "An attorney who is a member of the bar of any United States District Court ... may appear and practice in this court in a particular case by leave granted in the discretion of the court, provided.... (3) he is familiar with the Local Rules of the United States District Court for the District of Massachusetts; and provided further, his application for leave to practice in this court is on motion of a member of the bar of this court, who shall also file an appearance."

STATEMENT OF THE CASE

In 1986, Southern New England School of Law, a Massachusetts corporation with its principal place of business in that state, (hereinafter "So. New England") leased a part of a building located in Rhode Island from Northern Virginia Law School, a Virginia corporation with its principal place of business in Virginia. The lease required So. New Eng-

land to pay its rent into a designated bank account of Northern Virginia Law School (hereinafter"No. Va".) "or such substitute bank as Landlord shall designate." The lease also contained an acceleration clause allowing No. Virginia to demand the whole rent from So. New England if the latter failed to pay. When So. New England failed to pay any rent due under the lease, No. Virginia exercised the acceleration clause and demanded payment of all rent due under the lease. It also exercised its contract right to designate a Virginia bank as the place of payment of all rent due under the lease.

When So. New England still failed to pay, in February 1987 No. Virginia brought an action in the United States District Court for the Eastern District of Virginia for rent due. The amount in controversy was more than $ 10,000 and there was diversity of citizenship between the parties. In personam jurisdiction was asserted pursuant to Va. Code

sec. 8.01-328.1 as to the lease count. An additional count was added for violation of a copyright which belonged to plaintiff Alfred Avins as author and which was assigned to No. Virginia. Fourth Circuit law sanctioned this in personam jurisdiction. See Elefterion v. Tanker Archontissa, 443 F.2d 185, 188 (4th Cir. 1971); Dutta v. Clan Graham, 528 F.2d 1258, 1260 (4th Cir. 1975).

So. New England moved to dismiss in the Eastern District of Virginia for want of in personam jurisdiction, but instead the district judge ordered the case transferred to the District of Massachusetts for that reason. The file papers were promptly transferred by the clerk in Virginia to Massachusetts.

When the file reached Massachusetts, So. New England, the defendant, asserted in its answer a counterclaim filed for the first time in Massachusetts against Avins, a co-plaintiff appearing pro se, which demanded

sanctions under 28 U.S.C. sec. 1927 against Avins for having filed, as attorney the original complaint in the Eastern District of Virginia. (Avins was one of three attorneys for No. Virginia while the case was in the Eastern District of Virginia, but no sanctions were asked against Avins' two co-counsel there.) So. New England also requested that No. Virginia be required to comply with Local Rule 6, since Avins was continuing to appear as attorney for No. Virginia as well as co-plaintiff pro se, after the case was docketed in Massachusetts. This Rule requires associate Massachusetts counsel.

Both co-plaintiffs moved to re-transfer the case to Virginia. Avins moved to dismiss the counterclaim under 28 U.S.C. sec. 1927 on the ground that the Massachusetts court lacked jurisdiction over it, and that sanctions for alleged misconduct in Virginia had to be sought there. Hon. Douglas P. Woodlock,

United States District Judge for the District of Massachusetts, denied both motions. He also ordered No. Virginia to comply with Local Rule 6 and seek local counsel or suffer dismissal of its complaint.

No. Virginia and Avins then petitioned the U.S. Court of Appeals for the First Circuit which has appellate jurisdiction over Judge Woodlock, for writs of mandamus and prohibition pursuant to 28 U.S.C. sec. 1651 (a). The petition was denied without hearing, or briefing.

REASONS FOR GRANTING THE WRIT

(1) Transfer. The decisional law regarding review of transfer orders pursuant to 28 U.S.C. sec. 1404(a) is in a state of total chaos, with numerous conflicts between the Courts of Appeals of the several Circuits. See discussion in Roofing & Sheet Metal Services, Inc. v. LaQuinta Motor Inns, Inc., 689 F.2d 982, 985-87 (11th Cir. 1982) cited

by the First Circuit in this case. These conflicting decisions warrant resolution by this Court, more so than ordinary conflicting decisions of U.S. courts of appeal. In most cases wherein the decisions of the U.S. courts of appeals may conflict, a litigant is able to follow the rule laid down by the Circuit which supervises the district court in which his case is pending. However, in the case of transfer orders, such order may throw the litigant into an entirely different Circuit with an entirely different rule. This may result in the litigant being unable to appeal either in the "sending" Circuit or in the "receiving" Circuit.

In the instant case, petitioners followed the procedure laid down in In re Sosa, 712 F.2d 1479 (D.C. Cir. 1983), only to find that this procedure deprived them of appellate review in the First Circuit. There is no reason to believe that Congress intended

that transfer orders issued pursuant to 28 U.S.C. sec. 1404(a) should alone be non-reviewable in some Court of Appeals. But the net effect of the several appellate rulings is that transfer orders cannot be appealed in the "sending" circuit because it has lost jurisdiction due to physical transfer of the record, and cannot be appealed in the "receiving" circuit because the order was made by a judge of a district which is not part of that circuit. Nothing in the Judicial Code indicates that Congress intended to create a hiatus in appellate procedure producing this anomalous result.

The instant case is an especially fitting one for appellate review of transfer. Had the district judge in Virginia dismissed the case there on So. New England's motion, for want of personal jurisdiction, plaintiffs would have had the right to appeal to the Fourth Circuit, which appears to disagree

with the district judge regarding the validity and application of Virginia's long-arm statute. See Elefterion v. Tanker Archontissa, 443 F.2d 185, 188 (4th Cir. 1971). They lost that right as a result of the transfer. It was not Congress' intent to thus insulate district court decisions from appellate review.

Finally, there is intimation in Roofing and Sheet Metal, supra, p. 6, that litigation over transfers is a legal sideshow best discouraged by insulating transfer orders from appeals. Aside from the lack of support in the Judicial Code for such a view, transfers can affect the outcome of litigation. In diversity cases the forum court uses state law in determining such out-come incidents as statute of limitations, conflict of laws rules, burden of proof, and the like. Even when these are absent, transfers may increase expense and inconvenience. The universality

of state long-arm statutes demonstrates the recognition that where a case is tried has practical impact on litigation and consequently on transactions generally. Insulating transfer orders from appellate review indirectly thwarts public policy in this regard.

(2) Long-Arm Statute. Virginia Code, Sec. 8.01-328.1 represents a reasonable legislative judgment that a person who contracts to pay in Virginia ought to be subject to its judicial remedies if he breaks that promise. It should not be shocking to judicial conscience, and hence not a Due Process violation, that the legislature may allow creditors to collect debts at home rather than forcing them to chase debtors to wherever the latter may choose to roam. This rule which facilitates collection of just debts promotes credit and commerce. The time-honored phrase of the American

language that "the check is in the mail" implies that the check is being mailed to where the creditor is located. Even in the absence of contract "the place of payment is the creditor's residence or headquarters." Finance America Credit Corp. v. Kruse Classic Motor Co., 428 F. Supp. 135, 137 (E.D. Pa. 1977). Here the lease gave No. Virginia the right to designate the bank for payment. Having agreed to this, it should come as no surprise that default would entail collection in the state wherein the bank was located. The Virginia judge should not have held that in personam jurisdiction was lacking.

(3) Sanctions. The Court of Appeals refused to issue a writ of prohibition against the district court on the ground that the claim that the Massachusetts court lacked jurisdiction over a request for sanctions for litigation conducted in Virginia was an end-run around the finality rule. Such a

result reads writs of prohibition out of 28 U.S.C. sec. 1651(a). Prohibition is designed to prevent district courts from exceeding their jurisdiction. Ex parte New York, 256 U.S. 490 (1921). The only utility of prohibition is to act at the outset of litigation to save a party from the expense of trying a case which must inevitably be dismissed, for appeal on jurisdictional grounds is always available after final judgment.

Here the district court in Massachusetts is proceeding without even the shadow of jurisdiction, because it is manifest that the court which may impose sanctions under 28 U.S.C. sec. 1927 is the court in which proceedings have been unreasonably and vexatiously multiplied. Congress never intended to allow the seeker of penalties to deliberately refrain from asking that court for them, but rather to hoard his grievance and lie in wait for the unsuspecting lawyer,

until the latter is involuntarily thrust into another state where it is believed a harsher judgment will be imposed on counsel than the original forum which was familiar with the alleged misconduct would have done.

Here it is particularly inappropriate for defendant to belatedly pounce on counsel because petitioner's two co-counsel will go scot-free. Thus, the effect of defendant's forum-shopping will be to impose on Avins a burden of defending conduct which ought to be borne by all three attorneys who appeared for No. Virginia Law School in the Virginia court. To require petitioners to engage in a proceeding which is inevitably an exercise in futility converts the rule against piecemeal litigation into a rule which mandates litigation which cannot be entertained at all. This waste of scarce judicial resources should not be sanctioned by this Court.

(4) Local Counsel. In Frazier v. Heebe, 107 S.Ct. 2607 (1987), this Court condemned local rules which arbitrarily or unnecessarily barred or burdened out-of-state counsel from local federal district courts. In this case, Local Rule 6 burdens attorneys admitted to federal courts elsewhere with the trouble and expense of finding associate local counsel, if they have a case in Massachusetts. Such local attorneys generally serve only the same purpose as wooden Indian statues at the entrance to cigar stores did; they assure those entering of the quality of merchandise being offered but otherwise do not participate.

Here, the district court denied petitioners' request for exemption from Local Rule 6. No oral testimony, affidavits, or documentary evidence other than Avins' qualifications was received in either the district court or the court of appeals. The appel-

late court instead distinguished Frazier on the ground that Avins was not admitted in Massachusetts.

Under Massachusetts Local Rule 5 prior to 1986 an attorney engaged in practice or full-time teaching of law in Massachusetts could be admitted to the district court bar provided he was either a member of the Massachusetts state bar or the bar of any other United States District Court. Since July 1, 1986, admission to the federal bar in Massachusetts is restricted to state bar members familiar with federal and local federal court rules, regardless of where they live or what they do. Thus, the court of appeals, in common with the district court rules, have eliminated availability as a test for practice and equate state bar membership with minimum competency requirements.

Here that is totally arbitrary. Avins showed that he has been admitted to the Uni-

ted States District Court for the District of Columbia since 1956. He has also been admitted to other bars for decades, including this one since 1959. The case involved a claim under the Copyright Act, 17 U.S.C. sec. 501 et seq., which is governed by federal, not state law. Another count demanded damages for breach of a lease of premises located in Rhode Island. The conflict of laws rules of Massachusetts, in common with those of other states, look to the substantive law of the state wherein the land is located to determine the rights and duties of parties to a lease. 2 Beale, Conflict of Laws, sec. 222.1(1935); American Realty Co. v. Eastern T.&R. Co., 274 Mass. 297, 174 N.E. 486 (1931). Thus, it appears that Massachusetts law is irrelevant to this case.

However, even were it to be found that some knowledge of Massachusetts law was needed, this should not be beyond the ability

of a District of Columbia lawyer with over 31 years of experience to acquire. Massachusetts is not located on such an alien planet that its law cannot be fathomed by an attorney trained elsewhere. It is especially ironic to note that U.S. District Judge Woodlock who enforced Local Rule 6 here was graduated from Georgetown University Law School in 1975, or 19 years after petitioner Avins was admitted to the bar. If Georgetown Law Center specializes in any local law it would be that wherein it is located, which is the District of Columbia. If Judge Woodlock made the transition, so can Avins. (See Martindale-Hubbell, Mass. vol. 1984, p. 1467B).

The local counsel rule is especially unjustified here because the present case was transferred from Virginia against petitioners' wishes. Thus, this extra burden is in no sense voluntary. Moreover, petitioner Avins as co-plaintiff must appear and familiarize

himself with whatever Massachusetts law may be applicable in his capacity as co-plaintiff pro se.

There may be instances where local counsel is necessary but a blanket rule which requires them for purely decorative purposes lacks rational justification. This inflexible Rule 6 should be declared invalid under the Frazier doctrine, supra.

CONCLUSION

For the reasons stated, the petition for certiorari should be granted.

Respectfully submitted,

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February 10, 1988

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT--- Misc.No. 87-8063

IN RE NORTHERN VIRGINIA LAW SCHOOL, INC. and ALFRED AVINS, Petitioners

MEMORANDUM AND ORDER Entered December 31, 1987

The petition of Northern Virginia Law School, Inc. and Alfred Avins (petitioners), pursuant to 28 U.S.C. sec. 1651(a) is denied.

'Petitioners' first request is that the case be ordered retransferred to the district court for the Eastern District of Virginia, where petitioners initially filed suit. We deny the request because this court cannot review the Virginia district court's order transferring the case to the district of Massachusetts, see 28 U.S.C. sec. 1294(1); Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 985-87 (11th Cir. 1982)(Court of Appeals for the Eleventh Circuit lacked jurisdiction to review transfer order of a district court in another circuit), and we will not review the

interlocutory order of the court below denying petitioners' motion to retransfer the action to Virginia. See In re Josephson, 218 F.2d 174, 183 (1st Cir. 1954)(only in "really extraordinary situations" will request for mandamus be considered regarding district court transfer orders).

Petitioners' second request is that this court order the dismissal of a counterclaim against petitioners. Clearly this is an attempt by petitioners to have this court review an "otherwise unreviewable interlocutory order." As such, we must deny it. See ISM Corp. v. GKN Fasteners, Ltd., 574 F.2d 17, 23 (1st Cir. 1978)(citations omitted).

Finally, petitioners request this court to vacate the district court's order requiring them to comply with the district court's Local Rule 6. Petitioners claim that Local Rule 6 is invalid based on a recent United States Supreme Court opinion,

Frazier v. Heebe, 107 S. Ct. 2607 (1987). That case is inapplicable to petitioners' situation because Avins, unlike the attorney in Frazier, is not admitted to the bar of the state in which the district court sits (here Massachusetts). As no other "extraordinary" situation exists, this court will not grant petitioners' third request. See USM Corp., 574 F.2d at 23 (writ of mandamus limited to only extraordinary situations). Campbell,C.J., Coffin & Selya,JJ.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS: C.A. 87-0890-WD

NORTHERN VIRGINIA LAW SCHOOL, INC. and ALFRED AVINS, Plaintiffs,

v.

SOUTHERN NEW ENGLAND SCHOOL OF LAW, INC. Defendant.

Before Douglas P. Woodlock, U.S.D.J.
November 5, 1987.

/On plaintiffs' motion to re-transfer entire case, or in the alternative if the Court does not dismiss the counterclaim, then the counterclaim, to the United States District Court for the Eastern District of Virginia, and on plaintiffs' motion to dismiss the counterclaim:/ DENIED.

" PROCEDURAL ORDER: After hearing this day, the plaintiff will be given until 12 noon 12/28/87 to submit papers satisfying the requirements of Local Rule 6 or suffer dismissal of the action by the corporate plaintiff."

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA: ALEXANDRIA DIVISION

NORTHERN VIRGINIA LAW SCHOOL, INC., and ALFRED AVINS Plaintiffs,

v.

SOUTHERN NEW ENGLAND SCHOOL OF LAW, INC., Defendant.

Civil Action No. 87-148-A

ORDER: April 3rd, 1987

"For the reasons stated from the bench, the court concludes that it lacks personal jurisdiction over the defendant because the defendant does no business here, has no students here, did not enter into any of the transactions in question here, and did not mail the allegedly infringing publication into Virginia, but that the appropriate remedy is transfer rather than dismissal of the action, it is hereby

"ORDERED that this action is transferred to the United States District Court for the District of Massachusetts."

Albert V. Bryan, Jr., United States District Judge